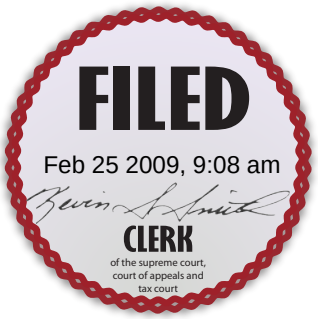

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IN THE
COURT OF APPEALS OF INDIANA

RANDALL C. McSWAIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 26A04-0810-CR-585
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GIBSON CIRCUIT COURT
The Honorable Jeffrey F. Meade, Judge
Cause No. 26C01-0806-FB-10

February 25, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Randall C. McSwain appeals his sentence for operating while intoxicated causing death, a Class B felony.[1] We affirm.

FACTS AND PROCEDURAL HISTORY

On June 6, 2008, Mike Cunningham was loading a disabled vehicle onto a flatbed wrecker on the shoulder of U.S. 41. McSwain was driving a semi truck in the adjacent lane. McSwain veered out of his lane and hit Cunningham, killing him instantly. McSwain tested positive for cocaine.

McSwain was charged with operating while intoxicated causing death as a Class B felony. On August 27, 2008, McSwain pled guilty without a plea agreement.[2] McSwain admitted he used cocaine the day before the accident and had metabolites in his body at the time of the accident.

A sentencing hearing was held on September 26, 2008. The trial court commented on several mitigators McSwain offered, including: McSwain's guilty plea, his difficult childhood, his remorse, undue hardship to his daughter, his character, the offense was the result of circumstances unlikely to recur, some of his previous convictions were remote in time, and he would be likely to respond to short-term imprisonment. The trial court also commented on potential aggravators, including: McSwain's history of criminal activity, his risk of committing another crime, his failure to pay child support, need for rehabilitation best provided by a penal facility, the facts and circumstances of the offense,

[1] Ind. Code § 9-30-5-5.
[2] McSwain also admitted to two infractions, which are not at issue in this appeal.

and the harm suffered by the victim. The trial court sentenced McSwain to eighteen years in the Department of Correction.[3]

DISCUSSION AND DECISION

McSwain raises five issues, which we reorder and restate as: (1) whether his sentence is inappropriate; (2) whether the trial court abused its discretion by finding his child support arrearage an aggravating circumstance; (3) whether the trial court abused its discretion by finding multiple aggravating circumstances based on his criminal history; (4) whether a discrepancy between the trial court's oral and written statements requires revision of his sentence; and (5) whether his sentence violates Article 1, Section 18 of the Indiana Constitution.

1. Appropriateness of Sentence

McSwain frames his first issue as whether his "sentence was inappropriate in the context of his open plea to the trial court." (Appellant's Br. at 13.) McSwain quotes Ind. Appellate Rule 7(B): "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." However, McSwain proceeds to argue

> the trial court abused its discretion by (1) entering a sentencing statement that includes reasons not supported by the record; (2) by entering a sentencing statement that omits reasons supported by the record and advanced for consideration and by (3) entering a sentencing statement that includes reasons that are improper as a matter of law, all of which shall be presented below.

[3] *See* Ind. Code § 35-50-2-5 ("A person who commits a Class B felony shall be imprisoned for a fixed term of between six (6) and twenty (20) years, with the advisory sentence being ten (10) years.").

(*Id*. at 14.)

McSwain elaborates on his abuse of discretion claims in other sections of his brief, but provides no analysis of his character or the nature of his offense. McSwain has not presented a cogent argument under App. R. 7(B) supported by citations to authorities and parts of the record; therefore, the issue is waived. *See Allen v. State*, 875 N.E.2d 783, 788 n.8 (Ind. Ct. App. 2007) (App. R. 7(B) review waived where Allen did not develop argument independent of abuse of discretion claims); *see also King v. State*, 894 N.E.2d 265, 267 (Ind. Ct. App. 2008) ("inappropriate sentence and abuse of discretion claims are to be analyzed separately").

2. Child Support Arrearage

Sentencing decisions rest within the sound discretion of the trial court and are reviewed for abuse of discretion. *Anglemyer v. State*, 868 N.E.2d 482, 490 (Ind. 2007), *clarified on reh'g on other grounds*, 875 N.E.2d 218 (Ind. 2007). An abuse of discretion occurs if the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Id*. A trial court may abuse its discretion by finding aggravators that are not supported by the record or are improper as a matter of law. *Id*. at 490-91.

The trial court found:

> The PSI notes, and the defendant did not dispute or otherwise qualify, that he is in child support arrears of approximately $20,000.00. The court considered this as an aggravating circumstance as the defendant's failure to support his child speaks to the quality of his character. Kirby v. State, 746 N.E.[2]d 440, 443 (Ind. Ct. App. 2001), trans. denied.

(Appellant's App. at 140-41.) In *Kirby*, we held the trial court could permissibly consider as an aggravator that the defendant had failed to pay child support because "such

behavior speaks to the quality of Kirby's character." 746 N.E.2d at 443. Consideration of a child support arrearage is not improper as a matter of law. *See id*.

McSwain's daughter testified McSwain had provided monetary support during her life and defense counsel asserted McSwain had paid child support for twenty years, but neither indicated the amount of support he paid. As noted by the trial court, the pre-sentence investigation report[4] states McSwain has an arrearage of approximately $20,000, and McSwain did not dispute that. Therefore, the trial court's finding is supported by the record.

McSwain argues his support arrearage should be given little or no weight because it is unrelated to his offense. However, we no longer review a trial court's weighing of aggravating and mitigating circumstances. *Anglemyer*, 868 N.E.2d at 491.

3. Criminal History

McSwain argues the trial court improperly found his criminal history, his likelihood to commit another offense, and his need for rehabilitation in a penal facility as separate aggravators. He relies on *Williams v. State*, 838 N.E.2d 1019 (Ind. 2005).

Williams was sentenced under the presumptive sentencing scheme. The trial court found as separate aggravators his criminal history, his likelihood to commit another offense, and his need for rehabilitation best provided by a penal facility. Our Supreme Court held these could not be treated as separate aggravators:

[4] We note McSwain's counsel included in the appendix a copy of the pre-sentence investigation report on white paper. We remind counsel that Ind. Appellate Rule 9(J) requires that documents and information excluded from public access pursuant to Ind. Administrative Rule 9(G), which includes presentence investigation reports, must be filed in accordance with Ind. Trial Rule 5(G). That rule provides such documents must be tendered on light green paper or have a light green coversheet and be marked "Not for Public Access" or "Confidential." T.R. 5(G)(1).

> The trial court's second and third aggravating factors (likelihood to re-offend and need for rehabilitation) spring from a single source: the fact of the prior convictions. This single fact cannot be used as three separate aggravators. While there has been some tendency to sanction these aggravators on grounds that they derive from a defendant's prior criminal history, we have held that such statements are more properly characterized as "legitimate observations about the weight to be given to facts . . . ." They do not serve as separate aggravators, at least absent a jury determination.

Id. at 1021 (citations omitted). Under our advisory sentencing scheme, finding multiple aggravators stemming from the defendant's criminal history is no longer improper as a matter of law. *See McMahon v. State*, 856 N.E.2d 743, 751 n.8 (Ind. Ct. App. 2006) (failed attempts at rehabilitation and criminal history could not be separate aggravators under presumptive sentencing scheme, but that argument is not available under new sentencing scheme).

Even assuming a trial court might still abuse its discretion by finding multiple aggravators based on the defendant's criminal history, we do not find that to be the case here. The trial court commented on each factor advanced by the parties, some of which involved overlapping evidence. Regarding the challenged factors, the trial court found:

> **History of Criminal Activity.** The PSI outlines a criminal history that spans approximately 34 years.
>
> **Risk of Committing Another Crime and Defendant's Character.** The PSI documents under "Prior Legal History" [list] a large number of arrests and dismissals in a number of different counties and States. The court recognizes that records of arrests are not considered criminal history and were not considered in analyzing this factor. However, the record of arrests do[es] suggest that the defendant in this case had exhibited anti-social behavior that has not been deterred after having been subjected, numerous times, to police authority.
>
> * * * * *
>
> **Defendant is in Need of Correctional or Rehabilitative Treatment That Can Best Be Provided by Commitment to a Penal**

> **Facility.** Court finds this aggravator supported a sentence in excess of the advisory sentence as prior lenient treatment in prior sentencings has had no obvious deterrent effect on the defendant.

(Appellant's App. at 140-41.) These findings are supported by the record.[5] Even under *Williams*, aggravators such as risk of committing another crime and need for rehabilitation in a penal facility may be viewed as comments on the weight to be attributed to a defendant's criminal history. 838 N.E.2d at 1021. The record reflects McSwain has an extensive criminal history, which the trial court carefully considered and determined was entitled to significant weight.

4. Sentencing Statement

McSwain argues his sentence should be revised due to a discrepancy between the trial court's oral and written statements. At the sentencing hearing, McSwain argued he did not contemplate the extent of the loss.[6] When commenting on McSwain's proffered mitigators, the court stated, "Did not contemplate the extent of the loss. I will note . . . that's a valid mitigator as it relates to the State's position of the injur[y] to the family."

[5] McSwain was convicted in 1976 of two marijuana-related offenses that were reduced to misdemeanors in Volusia, Florida. In 2001, he pled no contest to not having an operator's license, a misdemeanor, in Person County, North Carolina, and the disposition is listed as "cost remitted." (Appellant's App. at 54.) He was convicted twice in 2001 of passing worthless checks in Person County, North Carolina. At least one of those sentences was suspended on the condition that he pay costs. McSwain was also convicted in 2004 of possession of marijuana in Person County, North Carolina. He was sentenced to ten days in jail and eighteen months on probation, and he still owes fees. McSwain was also charged with: assault/battery in Hillsborough County, Florida in 1982 (McSwain disputes that he was ever charged in Hillsborough County); aggravated assault/battery in Tampa, Florida in 1983; two counts of aggravated assault and two counts of criminal mischief in Polk County, Florida in 1985; battery in Polk County, Florida in 1991; improper temporary tag in Polk County, Florida in 1991; nonsupport of a child in Person County, North Carolina in 1996; and abandonment for six months in Person County, North Carolina in 2000. Each of these was dismissed. McSwain also has a pending charge of patronizing a prostitute in Vanderburgh County.

[6] Defense counsel did not elaborate on this argument. She may have been referring to McSwain's statements to the court that he did not believe he was still intoxicated at the time of the accident, as he had used the cocaine the day before.

(Tr. at 41-42.) However, the trial court ultimately did not recognize injury to the family as an aggravator. The trial court did not comment in its written order on McSwain's argument that he did not contemplate the extent of the loss, but did reject injury to the family as an aggravator, and the same sentence was imposed at the hearing and in the written order.

In *McElroy v. State*, 865 N.E.2d 584 (Ind. 2007), the trial court's oral and written statements were inconsistent. McElroy had two previous arrests, but no convictions. At the sentencing hearing, the trial court found McElroy's lack of criminal history as a mitigator. The written statement read, "Court finds aggravating the defendant has a prior criminal history," and also added as an aggravator the risk that McElroy would commit another crime. *Id*. at 588. Our Supreme Court held any error was harmless because the oral and written statements both imposed the same sentence. *Id*. at 591.

In McSwain's case, the same sentence was imposed at the hearing and in the written statement; therefore, any error was harmless. *See id*. The trial court's thorough discussion of numerous sentencing factors spanned thirteen pages of the transcript, and it issued an eight-page sentencing statement. The trial court fulfilled its duty to give "a reasonably detailed recitation of [its] reasons for imposing a particular sentence." *Anglemyer*, 868 N.E.2d at 490.

5. Article I, Section 18

Article I, Section 18 provides: "The penal code shall be founded on the principles of reformation, and not of vindictive justice." McSwain argues his sentence violates Art. I, § 18 because the trial court's sentencing statements had a vindictive tenor. However,

as McSwain acknowledges, it is well-settled that "Section 18 applies only to the penal code as a whole and not to individual sentences." *Scruggs v. State*, 737 N.E.2d 385, 387 n.3 (Ind. 2000). Therefore, McSwain has not presented a cognizable claim. *See id*.

McSwain has not established any ground for revising his sentence; therefore, we affirm.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.